

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayner  
Ellen Gavin  
Marshall Johnson  
Phyllis A. Reha  
Gregory Scott

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Complaint of Nobles  
Cooperative Electric for a Service Territory  
Violation by Missouri River Energy Services  
and Worthington Public Utilities

ISSUE DATE: February 26, 2003

DOCKET NO. ET-10,E-126,E-332/C-02-1501

ORDER DISMISSING COMPLAINT

**PROCEDURAL HISTORY**

On September 10, 2002, Nobles Cooperative Electric (NCE) filed a complaint against Missouri Basin Municipal Power Agency d/b/a Missouri River Energy Services (MRES) and Worthington Public Utilities (WPU) alleging that WPU and its wholesale supplier MRES were providing retail electric power to wind turbine facilities located within NCE's exclusive assigned service territory. The complaint requested that the Commission direct WPU to cease providing this electric service to MRES and to direct MRES to cease taking the service from WPU.

On September 30, 2002, MRES and WPU filed a response to the complaint. MRES and WPU admitted providing "station service" to the wind turbine development through a dedicated transmission line feeding MRES power to the wind turbines, but denied that this constituted providing retail electric service. MRES and WPU requested that the Commission dismiss the complaint in its entirety.

On October 4, 2002, the Commission received comments from the Department of Commerce (DOC) recommending that the Commission dismiss the petition as incomplete. In the alternative the DOC recommended that the Commission take the following actions:

- define purchases for items such as lighting as retail purchases;
- grant NCE's complaint for the two Wisconsin Public Power Inc. (WPPI) turbines only;
- direct the utilities to resolve the issues and report to the Commission and DOC on any changes needed to service-area maps.

The DOC did not recommend either a contested case hearing or legal briefs.

On October 7, 2002, NCE submitted its comments. NCE requested that it be given access to certain contracts between MRES and others on issues related to the complaint. It suggested a further briefing schedule followed by a second Commission meeting. Further NCE stated it would like to avoid a contested case hearing.

The Commission met on October 10, 2002, to consider this matter.

In its October 31, 2002 ORDER REQUESTING COMMENTS, PERMITTING LIMITED DISCOVERY AND REQUIRING SIMULTANEOUS BRIEFING, the Commission requested comments on the issue of how to distinguish station power from retail sales, and whether such a distinction was necessary or desirable, as well as the procedures the Commission should follow going forward. The Order also established a schedule for discovery and briefing by the parties.

By October 31, 2002, comments had been filed by Jeffrey M. Jansen, Elk River Municipal Utilities, Owatonna Public Utilities, Southern Minnesota Municipal Power Agency, the City of Detroit Lakes, Lyon-Lincoln electric Cooperative, Sioux Valley-Southwestern Electric Cooperative, Inc., Otter Tail Power Company, the Department of Commerce, the City of Fairmont, the American Wind Energy Association, and the Minnesota Municipal Utilities Association. Comments were filed by Xcel Energy and Minnesota Power on November 15, 2002 and November 19, 2002, respectively.

On November 14, 2002, MRES and WPU filed their supplemental response and NCE filed its initial brief.

On November 22, 2002, the DOC, NCE, and MRES and WPU filed reply briefs.

This matter came before the Commission on January 9, 2003.

## **FINDINGS AND CONCLUSIONS**

### **I. Background**

#### **A. The Parties and Related Entities**

NCE is a rural electric cooperative with an assigned service territory in Nobles County. NCE brought the complaint against WPU, a municipal electric utility with an assigned service territory located generally within the City of Worthington, and its wholesale supplier, MRES.

MRES is a wholesale electric supplier to its member municipal electric utilities, including WPU. WPU is a member of MRES and purchases approximately 70% of its energy needs from MRES.

Western Minnesota Municipal Power Agency (Western Minnesota) is a municipal power agency and is the owner of the generation facilities used by MRES. MRES purchases all of the output of

the generation facilities owned by Western Minnesota, including the output from the turbines herein. MRES operates and maintains the wind turbines herein for Western Minnesota.

Wisconsin Public Power is a wholesale electric supplier to its Wisconsin municipality members.

Alliant-West (now known as Interstate Power & Light) is the control area operator in this vicinity. MRES has a network transmission contract with Alliant-West for transmission service to and from Worthington. WPU is not a party to that transmission contract.

## **B. The Wind Turbine Project**

MRES/Western Minnesota, WPU and WPPI are the developers of a project to construct six wind turbines west of Worthington. Four of the planned turbines have been operational since approximately July, 2002. Two are owned by Western Minnesota and two are owned by WPPI. Plans call for the final two turbines to be built by WPU, with their output to be sold to MRES.

Western Minnesota has contracted to provide the entire output of its turbines to MRES. MRES also serves as management agent for the turbines.

In times of adequate wind, the turbines supply their own electric energy needs. The electric power in dispute herein is the service power and energy needed to meet the turbines' internal needs (minimal security lighting, yaw drive, FAA lighting, computer equipment, lube oil heating and others) when there is no wind, and the turbines therefore cannot supply this for themselves.

When there is no wind power, the service power and energy is supplied to the MRES/Western Minnesota turbines from generation resources of MRES, then transmitted to a WPU substation where it is delivered through a dedicated circuit breaker to a dedicated electric line that runs to the project. Pursuant to an agreement between the developers, WPU extended the dedicated electric line for electric service to and from the project, although the costs have been shared by MRES, WPU and WPPI.

It is expected that the present wind turbines will consume approximately 20,000 kWh per year from off-site generation resources.

## **II. NCE's Complaint**

NCE's complaint alleged that WPU and its wholesale supplier, MRES, were providing retail electric power to wind turbines owned and operated by MRES and located within NCE's exclusive assigned service territory. NCE indicated that the service provided was necessary, due to the intermittence of the wind resource, for, among other things, security lighting, computer equipment, yaw drive, and lube oil heating. NCE alleged that this was in violation of Minn. Stat. § 216B.40 (giving an exclusive service right) and did not meet the requirements of Minn. Stat. 216B.42 (permitting service line extension in certain circumstances).

Further, NCE argued that this service was retail electric service under Minnesota statutes<sup>1</sup> and cannot be provided by an electric utility within another utility's service territory without that utility's consent. NCE stated that it had not given its consent.

It asked the Commission, in this situation, to stop WPU from providing the electric service to MRES and to stop MRES from taking such electric service from WPU.

### **III. Pertinent Legal Standards**

Minnesota Policy on assigned service areas is set forth in Minn. Stat. § 216B.37, which states as follows:

It is hereby declared to be in the public interest that, in order to encourage the development of coordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public, the state of Minnesota shall be divided into geographic service areas within which a specified electric utility shall provide electric service to customers on an exclusive basis.

Minnesota statutes set forth the procedure for establishing assigned service areas<sup>2</sup> and describe the exclusive right given each utility.<sup>3</sup> The exclusive right is set forth as follows:

Except as provided in sections 216B.42 and 216B.421, each electric utility shall have the exclusive right to provide electric service at retail to each and every present and future customer in its assigned service area and no electric utility shall render or extend electric service at retail within the assigned service area of another electric utility unless the electric utility consents thereto in writing; provided that any electric utility may extend its facilities through the assigned service area of another electric utility if the extension is necessary to facilitate the electric utility connecting its facilities or customers within its own assigned service area.

Minn. Stat. § 216B.40.

The statute also allows an electric utility to extend electric lines for electric service to its own property and facilities, thus providing an exemption from the service territory laws.<sup>4</sup>

Certain relevant terms, as they apply to the above statutory sections, are defined in Minn. Stat. § 216B.38, as follows:

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<sup>1</sup> Minn. Stat. § 216B.40.

<sup>2</sup> Minn. Stat. § 216B.39.

<sup>3</sup> Minn. Stat. § 216B.40,

<sup>4</sup> Minn. Stat § 216B.42, subd. 2.

Subd. 4. Electric line. "Electric line" means lines for conducting electric energy at a design voltage of 25,000 volts phase to phase or less used for distributing electric energy directly to customers at retail.

Subd. 4a. Electric service. "Electric service" means electric service furnished to a customer at retail for ultimate consumption, but does not include wholesale electric energy furnished by an electric utility to another electric utility for resale.

Subd. 5. Electric utility. "Electric utility" means persons, their lessees, trustees, and receivers, separately or jointly, now or hereafter operating, maintaining or controlling in Minnesota equipment or facilities for providing electric service at retail and which fall within the definition of "public utility" in section 216B.02, subdivision 4, and includes facilities owned by a municipality or by a cooperative electric association.

#### **IV. Positions of the Parties**

##### **A. NCE**

NCE stated that there is no dispute that the wind turbines are located in NCE's service territory and that NCE has not consented to any other electric utility providing service in its territory.

NCE argued that the main question is whether, under the service territory statutes, WPU is providing retail electric service to the wind turbines.

NCE argued that the electric energy required by MRES during the turbine's non-generation periods is retail electric service because it is consumed on-site and not resold.

WPU extended a 15kV distribution feeder from Worthington Station No. 1 to the site. This line, NCE argued, is providing electric energy at distribution level voltage to a customer for ultimate on-site consumption and is retail service.<sup>5</sup>

Further, although § 216B.42, subd.2 provides that an electric utility may extend electric lines for service to its own utility property and facilities, NCE argued that neither MRES nor WPPI qualify as an electric utility since neither MRES or WPPI operates, maintains or controls equipment or facilities in Minnesota for providing retail electric service.<sup>6</sup>

In response to MRES/WPU's argument that the electrical needs of the turbines during non-generation periods are station power and not retail power, NCE indicated that there is no exception in the service territory laws for station power and that station power is indistinguishable from standby or supplemental power, which are standard retail services.

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<sup>5</sup> See the definition of "electric line" in Minn. Stat. § 216B.38, subd. 4.

<sup>6</sup>See definition of electric utility, Minn. Stat. § 216B.38, subd.5

NCE argued that there is no practical difference in terms of necessary standby service between customer owned generation and MRES owned generation when the usual power source fails. If standby service is retail service in the case of customer owned generation, then it is retail service in the case of MRES.

In response to MRES' argument that it is serving itself and that WPU does not provide retail electric service to the turbines, NCE argued that without access to the WPU owned Worthington Substation No. 1 and without access to the WPU owned distribution feeder circuit leading from the substation to the wind site, the electrical requirements of MRES could not be met.

## **B. DOC**

The DOC argued that the electric service taken by MRES from WPU was retail service. It argued that when the facility was not generating power the facility's internal needs must be met from off-site generation that is transmitted to the facility. This power is consumed at the generating facility and is not resold to another entity. The DOC concluded that under the definition of electric service<sup>7</sup>, when a generating facility is unable to meet its own needs, the power furnished to it is retail electric service.

The DOC agreed that customers can elect to supply their own retail electricity needs themselves and are not required to purchase retail services from the incumbent utility. However, the DOC argued, if a facility cannot meet its own needs, whether by self generation or by meeting the provisions of Minn. Stat. § 216B.42, subd. 2 (extending electric lines for electric service to its own facility), the facility must purchase power from the incumbent utility.

The DOC also argued that WPU's extension of an electric service line to serve the retail purchases of MRES' generating equipment qualified for the exemption, permitting a utility to service to its own facility, under Minn. Stat. § 216B.42. This determination was based upon the fact that MRES was a joint action agency and WPU was a member of MRES. The DOC argued that WPU and MRES were acting jointly, and therefore met the definition of an electric utility under the statutory exemption. For this reason, WPU could extend an electric line to serve the retail purchases for the two turbines owned by MRES without violating the service territory statute.

However, the DOC argued, the two turbines owned by WPPI do not qualify for the exemption under Minn. Stat. § 216B.42 because there is no joint action as WPU is not a member of WPPI.

## **C. WPU and MRES**

MRES argued that it is not an "electric utility" under the Minnesota exclusive service territory statute.<sup>8</sup> It argued that it does not operate, maintain or control, in Minnesota, equipment or

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<sup>7</sup> Minn. Stat. § 216B.38, subd. 4a.

<sup>8</sup> Minn. Stat. § 216B.40.

facilities for providing electric service for retail, therefore, it is not an electric utility under this statute and is not subject to the prohibition set forth therein.

Further, MRES argued that it provides wholesale electric power to the wind turbines when the wind cannot provide the power for the turbines. It argued that the necessary power is generated from MRES' wholesale resources, not WPU's retail service. The power is delivered through a dedicated transmission line which runs from the WPU substation to the turbines. This line is structured to deliver wholesale power to and from the Alliant-West transmission system to the turbines, without servicing retail customers. All costs attributable to the dedicated line are shared equally between MRES/Western Minnesota, WPPI and WPU. It is MRES' position that this is a purely wholesale operation.

In addition, MRES argued that there is no retail transaction. It argued that under the common understanding of "retail" there must be a "sale" and in the present situation there is no passing of title, nor is there a seller and a buyer. Instead, MRES supplies station service through its wholesale power, either on-site when the wind blows or off-site through the dedicated transmission line when the wind does not blow. Since there is no sale, there is no retail transaction in violation of the service territory laws.

MRES also argued that the Minnesota legislature has adopted a public policy of encouraging renewable energy alternatives such as these wind turbines. It argued that the costs to link the turbines to NCE's line as well as NCE's charges to the turbines for using its lines would be an additional cost to ratepayers. Such additional costs discourage the public policy of supporting renewable energy sources. Further, the legislature has expressed a policy of discouraging duplicate facilities. NCE's position would require unnecessary duplication of the electric transmission facilities and hardware for the generating facilities, undermining the public policy behind exclusive electric service areas.

MRES stated that FERC addressed the limits of its wholesale jurisdiction under the context of station service and concluded that the provision of station service from an owner's on-site generation or from the owner's other energy resources was not a "sale" subject to wholesale regulation.<sup>9</sup> It also concluded that "retail" service occurred only when station service was provided by a third party. MRES argued that the Commission should recognize the FERC analysis distinguishing retail from wholesale in the station service context.

In response to the DOC's comments, MRES argued that the test (for retail) is not whether there is ultimate consumption at the site. It argued that if that were the case, there would be a retail sale when the turbines power their own station needs. Rather, the issue is whether there is a sale that brings it within FERC's or the Commission's jurisdiction. Clearly, when there is station power by a third party a sale at retail occurs. However, if a generating utility provides its own station power, either on or off-site, it is functioning as a wholesale generating facility. It is not a retail sale.

Further, MRES argued, line voltage does not determine whether service is retail or wholesale. The

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<sup>9</sup> PJM Interconnection, L.L.C., FERC No. ER 00-3513-000 (March 4, 2001)

dedicated line between the WPU substation and the wind turbines is used exclusively to transmit power and energy to and from the wind turbines and is a transmission line fulfilling a wholesale function.

## **V. Comments of Non-Parties**

In response to the Commission's request for comments on how the public interest would be best served under the fact situation herein, the Commission received a number of comments from non-parties.

### **A. Minnesota Municipal Utilities Association**

The Minnesota Municipal Utilities Association took the position that this was not a service territory case. WPU was not gaining any new customers or new revenues. WPU entered into an arrangement to accommodate the expansion of wind generation facilities but it was not selling electricity to the wholesale providers who own the wind turbines at the site. The generating wholesale utilities who own and operate these turbines were providing all of the critical elements: the capital for the turbines, the costs for operation and transmission, scheduling and dispatching and the energy required to meet the need of the station on the few occasions when the wind was insufficient. This is not a case in which Minnesota's utility service territory law has any application. This is not a case which involves the provision of electric utility service at retail. This is a wholesale case and should be handled accordingly.

### **B. American Wind Energy Association**

The American Wind Energy Association indicated that no electric power was used at the wind project site except that required for operation and maintenance of the generating facility and therefore was not retail use. Further it stated that requiring infrastructure and equipment in parallel to that which exists to supply power to the purchasing utility is duplicative and not in the public interest.

### **C. Southern Minnesota Municipal Power Agency**

Southern Minnesota Municipal Power Agency<sup>10</sup> took the position that any and all electric energy consumed in the process of producing electricity should be considered station power. But for the production of electricity at the facility, the facility would not exist. It argued that the electricity consumed by the facility was not retail, which connotes sales being made to the ultimate consumer. NCE's position would increase burdens and expenses associated with new generation facilities and is against state policy. The added cost herein would be a disincentive to the construction of wind projects

### **D. City of Detroit Lakes.**

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<sup>10</sup> On behalf of Owatonna Public Utilities and the City of Fairmont.



The City of Detroit Lakes stated that it should be necessary for a generating facility to receive its auxiliary power from a local provider when such facility is not connected to an area or regional transmission system or connected in any way to another source of generation owned, operated or contracted for by the facilities owner or operator. Station auxiliary power should never be considered to be a retail use so long as the station is connected to a transmission system and the station owner or operator has rights or arrangements for input from other generation sources into such system.

**E. Jeffrey Jansen**

Jeffrey Jansen argued that station auxiliary power should never be considered to be retail use by power plants used for producing wholesale power to be sold for retail use. Such power plants should not be required to take retail service from the local provider to meet auxiliary power needs.

**F. Lyon-Lincoln electric Cooperative**

Lyon-Lincoln Electric Cooperative stated that it supports the position taken by NCE. It indicated that it presently has approximately 290 wind turbines within its service territory. Because of this the issue presented herein will have major significance to it.

**G. Glover, Helsper and Rasmussen, P.C.**

Glover, Helsper and Rasmussen, P.C., responding on behalf of Sioux Valley-Southwestern Electric Cooperative, Inc., (Sioux Valley Energy) indicated that Sioux Valley Energy has approximately 135 wind turbines on its system located in its assigned service territory in Pipestone County, which are presently being served by another retail supplier. This makes this issue of major significance to Sioux Valley Energy. It supports the position taken by NCE in this situation and is in agreement with NCE's arguments.

**H. Elk River Municipal Utility**

Elk River stated that if the local distribution system is being utilized to wheel power or provide auxiliary power in any fashion, then electrical service should be taken from the local provider.

**I. Xcel Energy**

Xcel argued that the current service territory statute is subject to some flexibility which would allow the Commission to engage in a public interest inquiry in determining how to resolve disputes of this type.

It argued that under the Minnesota statute the provision of retail electric service to third party vendors appears to be considered retail service. However, under FERC precedent, netting the supply portion of service has been construed not to be retail service. It suggested that statutory changes may be needed to ensure consistency between the Minnesota statute and FERC precedent.

It indicated that there are no clear guidelines in Minnesota statutes to determine under what conditions the generating facility would be required to take retail service from the local provider to meet auxiliary power needs.

#### **J. Minnesota Power**

Minnesota Power argued that, in the absence of retail choice, the generating facility is required to take retail service from the local provider to meet station auxiliary power needs when the generating facility is not receiving station auxiliary power from another generator directly owned by the same entity.

#### **K. Otter Tail Power**

Otter Tail Power argued that allowing utilities that own generation located in the service territory of other utilities to supply their own station service avoids the need for 15% capacity reserves<sup>11</sup> on the station service. It also avoids any necessity to have duplicate interconnections, one to provide power into the site and another to move power from the site.

### **VI. Commission Action**

The issue facing the Commission does not fit neatly within the current statutory paradigm – which limits the right to provide retail electric service to utilities serving within exclusive, assigned service areas – because that paradigm assumes a clear-cut distinction between retail service and wholesale service. Here, the station service being provided to the wind turbines has some of the qualities of retail service and some of the qualities of wholesale service.

The Commission must therefore examine the facts of this service situation in light of the statutory language and the public policies the statutory language is designed to serve. On the basis of this analysis, the Commission concludes that the service is not retail service within the meaning and purpose of the assigned service area statutes.

First, unlike traditional retail service, the service at issue is not being provided at retail rates under a retail tariff. Instead, service is being provided at cost under a joint operating agreement between business partners. This is not a sale of electricity between disinterested parties, but part of an ongoing series of reciprocal, contractual obligations between business partners.

Second, unlike traditional retail service, the service at issue is not being provided to a household, institution, or business for ultimate consumption apart from the production of electricity. Instead, the service is being provided to a generating facility to prevent damage to the facility during

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<sup>11</sup> Under the Generation Reserve Sharing Rules of the Mid-continent area Power Pool, members are obligated to maintain a 15% reserve margin above their annual maximum system demand. The station service requirements for generating facilities owned by the members are specifically excluded from the maximum system demand.

periods when it is incapable of self-generation. It is more closely related to the process of producing electricity than the process of consuming it.

For this reason the service at issue is very different from standby or supplemental service, to which it has been compared and to which it bears a superficial resemblance. Standby service provides electric service to a customer's load (an electric steel furnace, for example) during periods when the customer's generating facility, normally dedicated to that load, is down. Standby service may also include elements of station service, but does not necessarily do so. Supplemental service is additional electric power purchased from the utility to serve a load that is larger than the customer's generating capacity. The station service at issue here protects essential generator components while the generator is down, and does that exclusively because there is no separate customer load.

Third, treating the service at issue as other than retail service does not undermine the policies underlying the assigned service area statutes. The Legislature divided the state into assigned service areas and gave utilities exclusive service rights within these areas to ensure adequate, affordable electric service throughout the state.<sup>12</sup> Without exclusive service areas, utilities could not reasonably be required to make the large capital investments necessary to ensure service throughout the state. The Commission has therefore strictly enforced the assigned service area statutes, believing that incursions on service area integrity can have significant and escalating financial consequences over time on assigned utilities and their ratepayers.

Here, however, permitting the station service to continue appears to carry little risk of escalating losses to the assigned utility. The service is unique, clearly defined, and non-transferrable. It is limited in scope to the amount of power necessary to prevent damage to the turbine systems when self-generation is impossible.

In fact, this situation more closely resembles the statutory exception to exclusive service territories in which traditional retail providers are permitted to serve their own property, even if that property lies within another utility's assigned service area.<sup>13</sup> The service area statutes, of course, were written before ownership arrangements like the joint venture at issue became commonplace. The multi-ownership interests in the joint venture, however, create a situation analogous to the "self service" statutory exception, reinforcing the conclusion that the station service at issue does not conflict with the meaning and purpose of the service area statutes.

Finally, permitting the station service at issue to continue is consistent with, and furthers, this state's clear public policy requiring the development of renewable energy.<sup>14</sup> Making wind generation and other renewable technologies cost-competitive with traditional generation is a major

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<sup>12</sup> Minn. Stat. § 216B.37.

<sup>13</sup> Minn. Stat. § 216B.42, subd. 2.

<sup>14</sup> See, for example, Minn. Stat. §§ 216B.2422, 216B.23, 216B.2424.

and ongoing public policy challenge; permitting this at cost station service to continue is one small step toward meeting that challenge.

For all these reasons, the Commission concludes that the station service at issue is not retail service and is therefore not subject to the exclusive service provisions of the assigned service area statutes. The Commission will therefore dismiss the complaint.

**ORDER**

1. The Complaint filed by Nobles Cooperative Electric is dismissed.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)

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